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CURRENT TOPICS.

The Supreme Court of the United States has just rendered a decision in the famous murder case of State of Missouri v. Kring, involving a constitutional question of great nicety as to *ex post facto* laws. It would require too much space to recount all the steps which have been taken in that famous proceeding, inasmuch as it has been four times tried before a jury, heard three times before the St. Louis Court of Appeals, and three times before the Missouri Supreme Court. It is sufficient for an intelligent understanding of the decision of the Federal Supreme Court, to state that at the trial immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead guilty to murder in the second degree, and was sentenced to imprisonment for twenty-five years. He appealed from this judgment on the ground that he had an understanding with the prosecuting attorney that his term of imprisonment should not exceed ten years. The Supreme Court reversed the judgment, and remanded the case to the St. Louis Criminal Court for further proceedings. In that court he refused to withdraw his plea of guilty to murder in the second degree, and to enter a plea of not guilty to murder in the first degree, raising the point that the acceptance by the State was substantially an acquittal of the higher offense. The court overruled his objections, ordered the plea of guilty of murder in the second degree to be set aside, and the plea of not guilty of murder in the first degree to be entered. On this plea the prisoner was tried, convicted and sentenced to death. Upon appeal to the St. Louis Court of Appeals, and afterwards to the Supreme Court of Missouri, the point was made that at the time the offense was committed (January 4, 1875), it was the law of Missouri that a conviction and sentence for murder in the second degree was an acquittal of the charge of murder in the first degree and that the abrogation of this rule by sec. 23, art. 2 of the Constitution of Missouri, which went into effect November 30, 1875, was *ex post facto* and of no effect as to the prisoner. Both the State courts ruled that there was nothing in the point, inasmuch as the plea of guilty to murder in the second degree, which the prisoner claimed operated as an acquittal of the higher offense, was not entered until long after the constitutional provision in question went into effect; and that the change in the law was not within the terms of the Federal Constitution, prohibiting *ex post facto* laws, because it effects not a change in *crimes*, but merely a change in criminal procedure. This decision, on writ of error to the Supreme Court of the United States, has now been reversed by a very evenly divided court. The majority are, MILLER, BLATCHFORD, HARLAN, FIELD and WOODS, J. J.; and those dissenting: WAITE, C. J., and GRAY, BRADLEY and MATTHEWS, J. J. The opinion of the majority was delivered by Mr. Justice MILLER. In the course of it he takes broad ground on the subject of *ex post facto* laws, rejecting in strong terms the distinction between laws applicable substantially to crimes, and those applicable merely to criminal procedure. "When in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes, but in criminal procedure, we are led to inquire what that court meant by criminal procedure." * * * "We are of the opinion that any law passed after the commission of an offense which alters the situation of a party to his disadvantage, is an *ex post facto* law, and no one can be criminally punished except according to a law prescribed for his judgment by the sovereign authority before the imputed offense was committed, and which existed as a law at the time. Tested by these *criteria*, the provision of the Constitution of Missouri which denies the plaintiff in error the benefit which the previous law gives him of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is as to his case an *ex post facto* law within the meaning of the Constitution of the United States."

MASTER AND SERVANT.

1. *Risks of the Employment.*—It is a well-established rule of law, that a servant assumes all the risks of his employment.[1] A servant not only takes upon himself all the risks incidental to the employment, but also all growing out of patent or known defects.[2] It has been held that the ordinary risks and perils of the employment include such risks as arise from the negligence of those fellow-servants who are employed in the same department of the master's general business, and who are not his superiors in authority.[3] Some cases go even farther than this, and hold that the servants assume all the risks growing out of the negligence of fellow-servants in positions of greater responsibility and authority, or in a different line of employment, so long as both are in the same general business, so that the negligence of the one may contribute to the danger of the other.[4] The servant also assumes the risks growing out of a want of skill on the part of any fellow servant. The master does not warrant the competency of a co-servant, and is not liable for damages growing out of his want of skill, unless the master knew or could have known of his incompetency.[5] But where the work or service itself is free from danger, and the peril grows out of extrinsic causes or circumstances, not discernable by the use of ordinary precaution and prudence, the master is liable for want of care or negligence.[6] For it is well settled that the servant takes upon himself only the usual and necessary risks incident to the employment.[7]

As a general rule, a servant can not maintain an action against his master for injuries sustained in the course of his employment.[8] Yet the master must observe ordinary care for the personal safety of his servants, or he will be liable in damages for injuries sustained by reason of his failure to do so; the degree of care must always be in proportion to the hazard of the service.[9]

2. *Injuries from use of Defective Machinery.*—It has been laid down by our courts as a general rule, that a servant can not recover for injuries sustained in the course of his employment because of the use of defective machinery, unless the master knew, or could have known of the defect, and the servant did not know of such defect, and had no equal means of knowing of its existence.[10] The servant may assume, without investigation, that the machinery furnished is safe and adapted to the work.[11] The master does not guarantee the absolute safety or perfection of the machinery or apparatus furnished, but he is bound to exercise that care and diligence the exigencies of the case require in furnishing such machinery as is adequate and suitable.[12]

Between master and servant there is no implied warranty that the rolling stock and fixtures of a railroad or other appliance are complete and fit.[13] But it has been held that a railway company is liable for an injury occasioned by the breaking of a rod in the car brakes, the defective condition of which the company might have discovered by exercising ordinary care.[14]

The master's obligation to furnish suitable machinery for the use of his servants is not discharged by the employment of an agent or servant charged with the duty of performing this obligation.[15] And in Gazer v. Taylor,[16] a master was held liable for an injury by defective machinery, although the negligence of a fellow-servant contributed to the injury. It is the duty of the master to see that the

1 Perry v. Marsh, 25 Ala. 659; Gibson v. Erie Ry. Co., 63 N. Y. 449; Toledo Ry. Co. v. Black, 88 Ill. 112; Gibson v. Pac. Coast Ry., 46 Mo. 163; Wonder v. Baltimore, etc. Ry., 32 Md. 411; Strahlendorf v. Rosenthale, 30 Wis. 674.

2 De Forest v. Jewett, 23 Hun, 490.

3 Kielly v. Belcher, etc. Mining Co., 2 Sawyer, 437; Georgia R. Co. v. Rhodes, 56 Ga. 645; Wood v. New Bedford Coal Co., 121 Mass. 252; Hordy v. Carolina, etc. R. Co., 76 N. C. 6.

4 Quincy Mf'g Co. v. Kitts, 42 Mich. 34.

5 Chicago, etc. R. Co. v. Troegch, 68 Ill. 545; s. c., 18 Am. Rep. 578.

6 Perry v. Marsh, 25 Ala. 659; Spelman v. Fisher Iron Co., 56 Barb. 151; Strahlendorf v. Rosenthale, 30 Wis. 674.

7 Baxter v. Roberts, 44 Cal. 187; Ft. Worth, etc. R. Co. v. Gildersleeve, 33 Mich. 133; Hand v. Mississippi Cent. R. Co., 50 Miss. 178.

8 Johnson v. Bruner, 6 Phila. (Pa.) 554.

9 Chicago, etc. R. Co. v. Donahue, 75 Ill. 106.

10 Hayden v. Smithville, etc. Co., 29 Conn. 548.

11 Speed v. Atlantic, etc. R. Co., 71 Mo. 303.

12 Haugh v. Texas, etc. R. Co., 100 U. S. 213; Painter v. Northern Cent. R. Co., 83 N. Y. 7; Kranz v. White, 8 Ill. App. 583; Porter v. Hannibal, etc. R. Co., 71 Mo. 66.

13 I. & C. Ry. Co. v. Love, 10 Ind. 554.

14 Johnson v. R. & C. R. Co., 81 N. C. 446.

15 Bridges v. St. Louis, etc. R. Co., 6 Mo. App. 389; Cowles v. R. & D. R. Co., 84 N. C. 309; s. c., 37 Am. Rep. 620.

16 10 Gray, 274.

machinery used does not become dangerous because of wear and tear.[17] Thus it has been held that a railroad is liable to an employee for injury sustained because of want of repair of the roadbed;[18] or for permitting the road to become blockaded with snow and the cars to get out of repair;[19] or for negligently suffering a bridge to remain in an unsafe condition.[20]

The law requires a master to exercise a high degree—some of the cases say the highest degree—of care in furnishing his workmen with tools, etc.[21] And where the master does not exercise the ordinary care, or the requisite care, in the selection of machinery and the employment of servants, he is liable in damages to any servant who may be injured by reason of such negligence.[22] The burden of proof is always on the servant to establish such negligence in the master.[23]

The degree of care required of the master in selecting machinery, etc., for his servants, is measured by the circumstances, the nature of the business, incidental hazard, etc.[24] In Looman v. Brockway, where a brewer employed a servant to clean hogsheads with a steam apparatus for that purpose, and which was defective and dangerous because of the omission of a certain gauge or valve, but the servant did not know of such defect and danger, and was subsequently injured, it was held that the master was not liable.[25] It has also been held that a brakeman can not recover for an injury sustained because of a defect in a brake he was operating, which defect existed because of the negligence of a fellow-servant, unless the company were at fault in the selection or retention of such servant.[26] Where the master used a new kind of blasting powder, with the character and power of which his servants were unacquainted, and one of them was injured because of its use, he was held liable.[27]

17 McWilliams v. Union Press-Bench Works, 6 Mo. App. 434.
18 Snow v. Housatonic R. Co., 8 Allen, 441.
19 Fifield v. Northern Ry. Co., 42 N. H. 225.
20 Harrison v. Central R. Co., 31 N. J. L. 293.
21 Chicago, etc. R. Co. v. Maloney, 4 Ill. App. 262.
22 Harper v. Indianapolis, etc. R. Co., 47 Mo. 567.
23 Wonder v. Baltimore, etc. R. Co., 32 Md. 411; Davis v. Detroit R. Co., 20 Mich. 105.
24 Jones v. New York Central R. Co., 22 Hun, 284.
25 3 Robt. (N. Y.) 74; 28 How. Pr. 472.
26 Wonder v. Baltimore, etc. R. Co., 32 Md. 411.
27 Smith v. Oxford Iron Co., 42 N. J. L. 467; s. c., 36 Am. Rep. 535.

3. *Care and Skill Required of Master.*—The amount of care and skill required of the master varies with the nature and hazard of the employment. It has been held that the amount of skill required of a corporation or company is such as a prudent man would exercise under similar circumstances.[28] The master is liable for a want of due care in selecting competent servants.[29] Where a master has knowledge or notice of a defect in machinery and neglects to repair it, he will be held liable for any damages to his servant or servants from any injuries they may receive because of such negligence to repair.[30] Railroad companies have been held liable, on the principle that negligence of the agent or servant is the negligence of the principal or master, for the negligence of train superintendent;[31] and for the negligence of the road master.[32] Where a train running out of schedule time, ran over and killed a trackman, the company was held liable.[33] A railroad company is bound to see that the road is in a good condition and safe, and that the engines are properly constructed according to present improvements in the art, and to employ competent engineers to manage the latter; and if any injury is sustained by an employee by reason of imperfection of the road or the machinery, or want of skill on the part of the engineer, the company is liable if it had knowledge or notice, or by the exercise of ordinary care would have known of such defect or incompetency.[34]

It has been held that where a master builds a structure to be used in the ordinary course of his business, without fault as to plan, mode of construction and character of materials used, so that it was originally sufficient for all the purposes for which used, then employs skilful and trustworthy servants to supervise, test and examine it after put into use, and that duty is performed by such servants with frequency and with such tests as custom and experience have sanctioned and prescribed, he has exercised such care and skill as will relieve him of responsibility to an employee

28 Houston, etc. R. Co. v. Oram, 49 Tex. 341.
29 Mars v. Pacific R. Co., 49 Mo. 167; s. c., 8 Am. Rep. 126.
30 Cane v. Delaware, etc. R. Co., 15 Hun, 172.
31 Dobbins v. Richmond, etc. R. Co., 81 N. C. 446.
32 Houston, etc. R. Co. v. Dunham, 49 Tex. 181.
33 Haines v. E. Tennessee R. Co., 3 Caldw. 222.
34 Nashville, etc. R. Co. v. Elliot, 1 Caldw. 611.

for injuries sustained by reason of a defect in such structure.[35]

4. *Negligence of Fellow-Servants.*—It has been held that masters are liable to their servants for injuries resulting from the negligence of a fellow-servant whose orders the injured servant is bound to obey.[36] And there are a number of cases which hold that he is not liable,[37] unless he knew such servant to be incompetent;[38] or unless he was at fault in selecting or retaining such servant.[39]

It is held in a number of well-considered cases, that where a servant is injured by the negligence of a co-servant and himself, if such injury could have been avoided by the exercise of ordinary care on the part of his co-servant, the common master will be liable for such injury.[40] Thus, where an underworkman was injured by the negligence of a foreman, the master was held liable.[41] And where a brakeman was injured by a fellow-servant placing a defective freight car on the road, the company was held liable.[42]

On the other hand, it is held that no recovery can be had for injuries caused by the negligence of a fellow-servant, even where the negligent servant, in his grade of employment, is superior to the one injured.[43] Thus a car inspector, whose duty it is to send to the shop all cars out of repair, neglected to do so, and a brakeman was injured by reason of such neglect of duty, and it was held that the railroad company was not liable.[44] It has also been held that a brakeman, part of whose duty is to couple and uncouple cars, is regarded while so doing as in the same general line of employment as the engineer or conductor, and can not recover for an injury occasioned by the negligence of either.[45] And where a trackman was injured by an engineer backing a train of cars on to him without either ringing the bell or blowing the whistle, it was held that he could not recover damages from the company.[46]

The current of decisions is to the effect that where a master uses due diligence in selecting competent and trustworthy servants, and furnishes them with suitable tools and means to perform the services for which he employs them, he is not answerable in damages to one of them for injuries caused by negligence or incompetency of a fellow-servant in the same service.[47] But if the em-

[35] Warner v. Erie Ry. Co., 39 N. Y. 468; Brickner v. New York Central R. Co., 2 Lans. (N. Y.) 506.

[36] Cowles v. Richmond, etc. R. Co., 84 N. C. 309; S. C., 37 Am. Rep. 620; Galveston, etc. R. Co. v. Delahunty, 53 Tex. 206; Cowes v. Railway Co. (N. C.), 12 Rep. 219; McCormack v. Railway Co. (N. Y.), 12 Rep. 278; Railway Co. v. Lavalley, 12 Rep. 374.

[37] Peterson v. Whitebreast Coal Co., 50 Iowa, 673; S. C., 32 Am. Rep. 143.

[38] Peterson v. Whitebreast Coal Co., *supra;* Blake v. M. Cent. Ry., 70 Me. 60; S. C., 35 Am. Rep. 279.

[39] McDonald v. Hazletine, 53 Cal. 35.

[40] Louisville R. Co. v. Robinson, 4 Bush, 507; Toledo, etc. R. Co. v. Connor, 77 Ill. 391.

[41] Egan v. Tucker, 18 Hun. 347.

[42] Toledo, etc. R. Co. v. Ingraham, 77 Ill. 309.

[43] Shanck v. Northern, etc. R. Co., 25 Md. 462; O'Connell v. Baltimore, etc. R. Co., 20 Md. 212; Thayer v. St. Louis, etc. R. Co., 22 Ind. 26; Albec v. Agaman Canal Co., 6 Cush. 75; Sherman v. Rochester, etc. R. Co., 17 N. Y. 153; Cooper v. Mullins, 30 Ga. 146; S. P. O., etc. Ry. v. Hammersly, 28 Ind. 371; Donaldson v. Mississippi, etc. R. Co., 18 Iowa, 280; Carlin v. Charleston, 15 Rich. (S. C.) 201; Illinois Central R. Co. v. Cox, 21 Ill. 20; Lawler v. Androscoggin R. Co., 62 Me. 462; Mullen v. Steamship Co., 9 Phila. (Pa.) 16.

[44] Gibson v. Northern Central Ry., 22 Hun. 489.

[45] Wilson v. Madison, etc. Ry., 18 Ind. 226.

[46] Rohback v. Pacific Ry., 43 Mo. 187.

[47] Farewell v. Boston, etc. Ry., 4 Metc. 49; Hughh v. New Orleans Co., 6 La. An. 496; Beaulieu v. Portland Co., 48 Mass. 291; McDermot v. Pacific R. Co., 30 Mo. 115; Anderson v. New Jersey, etc. Ry., 7 Robt. (N. Y.) 611; Ponton v. Wilmington, etc. Ry., 6 Jones (N. C.), L. 245; Illinois Central Ry. v. Cop, 21 Ill. 20; Columbus, etc. Ry. v. Webb, 12 Ohio St. 475; Michigan, etc. Ry. v. Leahey, 10 Mich. 193; Sullivan v. Mississippi, etc. Ry., 11 Iowa, 421; Caldwell v. Brown, 53 Pa. St. 453; Fox v. Sanford, 4 Sneed, 36; Michigan Central Ry. v. Dolon, 32 Mich. 510; Dillon v. Union Pacific Ry., 3 Dill. 319; Howard v. Mississippi Central Ry., 50 Miss. 178; Lee v. Detroit Bridge & Iron Co., 62 Mo. 565; Kielly v. Belcher, etc. Mining Co., 3 Sawyer, 500; Memphis, etc. Ry. v. Thomas, 51 Miss. 637; Sullivan v. Toledo, etc. Ry., 58 Ind. 62; Smith v. Lowell Mn'fg. Co., 124 Mass. 114; Sherman v. R. & S. Ry., 45 Barb. 574; Walker v. Balling, 22 Ala. 294; Shields v. Yonge, 15 Ga. 349; Hanner v. Illinois, etc. Ry., 15 Ill. 550; Madison, etc. Ry. v. Bacon, 6 Ind. 205; Ohio, etc. Ry. v. Tindall, 13 Ind. 366; Slattery v. Toledo, etc. Ry , 23 Ind. 81; Carle v. Bangor, etc. Ry., 43 Me. 269; Hayes v. Western, etc. Ry., 3 Cush. 270; King v. Boston, etc. Ry., 9 Cush. 112; Brown v. Maxwell, 6 Hill, 592; Coon v. Syracuse, etc. Ry., 5 N. Y. (1 Seld.) 492; Karl v. Millard, 3 Bosw. (N. Y.) 591; Wiger v. Pennsylvania R. Co., 55 Pa. St. 460; Stranger v. McCormack, 1 Phila. (Pa.) 156; Marley v. Chamberlain, 18 Wis. 700; Whaalan v. M. R. & L. E. Ry., 8 Ohio St. 249; Pittsburg, etc. R. Co. v. Divinny, 17 Ind. 197; Chamberlain v. Milwaukee, etc. Ry., 11 Wis. 238; Columbus R. Co. v. Arnold, 31 Ind. 174; Foster v. Minnesota Central Ry., 14 Minn. 360; Cooper v. Milwaukee, etc. Ry., 23 Wis. 668; Lalor v. Chicago, etc. Ry., 52 Ill. 401; Chicago, etc. Ry. v. Murphy, 53 Ill. 336; Brothers v. Carter, 52 Mo. 372; Hogan v. Central Pacific R. Co., 9 Cal. 129; Coon v. T. S. & U. R. Co., 5 N. Y. 492: Warner v. Erie R. Co., 39 N. Y. 468; Brickner v. New York Central, 49 N. Y. 672; Lowing v. Same, Id. 521; Felike v. Bos-

ployer is at fault, either in the selection or retention of fellow-servants, he is liable.[48]

Fellow-servants are all who serve the same master, work under the same control, deriving authority and receiving compensation from the same source,and aee engaged in the same general business, although in different grades and departments.[49]

5. *Negligence of Master.*—It has been held that a master is liable to his servants for injuries caused by his negligence, unless the servants' negligence contributes to the injury.[50] So, also, is the master liable for an injury occasioned by the negligence of a fellow-servant where he himself is guilty of contributory negligence;[51] also if negligent in selecting servants, machinery or otherwise;[52] or for retaining incompetent servants.[53] And where a duty is delegated to a servant or an agent who is negligent or incompetent, the master is held the same as though he himself acted.[54] He is also liable to his servants for his own misconduct.[55] The burden is always on the servant to show negligence, misconduct or knowledge on the part of the master.[56]

The master does not warrant, by implication, the soundness of machinery employed, or the competency of co-servants. The exercise of due diligence in the selection of servants and providing machinery is all that is required of him.[57] In Braun v. Chicago, etc. R. Co.,[58] it was held that a brakeman can not maintain an action against a railroad company for an injury resulting from the negligence of the company to have the car inspected; but in McMahon v. Henning,[59] the defendant was held responsible for an injury resulting from the use of defective machinery, although the negligence of a fellow-servant contributed to the injury.

6. *Free Transportation to and from Work.*—Where a master has servants in his employ whom he transports, free of charge, to and from work, when an injury is sustained while being so conveyed, even though caused by the gross negligence of co-servants, or results from defective machinery used, where due care has been exercised in the employment of servants and the providing of machinery, no recovery could be had for such injury.[60] In Smith v. New York, etc. R. Co.,[61] it was held, that where a man was employed to work from day to day, and was injured while returning from work by the negligence or misconduct of the engine-driver, he could recover; and in O'Donnell v. Allegheny Valley R. Co.,[62] it was held that where a mechanic was transported to and from work by a railroad company as part of his wages, and he was injured by the breaking of a rail, that he could recover damages: (1) because he was not in the service of the company at the time, but a passenger for hire, and entitled to protection as such; and (2), because the breaking of a rail is not an ordinary peril in railway service.

7. *Unusual Danger.*—A master is bound to notify his servants if, from extraneous causes, the employment is hazardous and dangerous to a degree beyond what it fairly imports, or is understood by servants to be.[63] The master is bound to take reasonable precaution for the safety of his servants;[64] and is liable for

ton, etc. Ry., 53 N. Y. 549; Wright v. New York Central Ry., 25 N. Y. 562; Coulter v. Board of Education, 4 Hun. 569; Summerhays v. Kansas Pacific Ry., 2 Col. T. 84.

[48] McMahon v. Davidson, 12 Minn. 357; Wright v. New York Central Ry., 28 Barb. 80; Frazier v. Pacific Ry., 38 Pa. St. 104.

[49] Wonder v. Baltimore, etc. Ry., 32 Md. 41.

[50] Johnson v. Bruner, 61 Pa. St. 58; Spelman v. Turbin Iron Co., 56 Barb. 151; Lebron v. Pacific Ry., 46 Mo. 163; Wonder v. Baltimore, etc. Ry., 32 Md. 411.

[51] Paulmire v. Erie Ry., 34 N. J. L. 151.

[52] Perry v. Ricketts, 55 Ill. 234; Chicago v. R. Co., Id. 492.

[53] Laning v. New York Central Ry., 49 N. Y. 521; s. c., 10 Am. Rep. 417.

[54] Fink v. B. & A. Ry., 53 N. Y. 549; s. c., 13 Am. Rep. 545.

[55] Sizer v. Syracuse, 4 Lans. (N. Y.) 67; Leonard v. Collins, 70 N. Y. 90.

[56] Columbus, etc. Ry. v. Troesch, 68 Ill. 545; Murphy v. St. Louis, etc. Ry., 70 Mo. 202.

[57] Columbus, etc. Ry. v. Troesch, 68 Ill. 545; Toledo, etc. Ry. v. Conroy, Id. 560; Camp Point Mn'g. Co. v. Ballou, 71 Ill. 417.

[58] 53 Iowa, 595; s. c., 36 Am. Rep. 243.

[59] 1 McCray (C. Ct.), 516.

[60] Ryan v. Cumberland Valley Ry., 23 Pa. St. 384; Fitzpatrick v. New Albany Ry., 7 Ind. 436; Gillinan a. Harlem R. Co., 17 N. Y. 134; Seaver v. Boston, etc. R. Co., 14 Gray, 466; Gillman v. Stony Rock Ry., 10 Cush. 228.

[61] 6 Duer (N. Y.), 225.

[62] 59 Pa. St., 239.

[63] Baxter v. Roberts, 44 Cal. 178; s. c., 13 Am. Rep. 160; Perry v. Marsh, 25 Ala. 659.

[64] Braydon v. Stewart, 2 Macq. H. L. C. 30; Patterson v. Wallace, 1 Id. 748; Weems v. Matherson, 4 Id. 215; Hallomer v. Henley, 6 Cal. 209; Chicago, etc. Ry. v. Jackson, 55 Ill. 429; s. c., 8 Am. Rep. 661; Gibson v. Pacific Ry., 46 Mo. 163; Coombs v. New Bedford Cordage Co., 120 Mass. 572; s. c., 3 Am. Rep. 506; Cayzer v. Taylor, 10 Gray, 274; Seaver v

injuries arising from those defects of machinery, etc., it was his duty to have searched out and remedied.[65] Where the master increases the peril of the employment, he is liable in damages for all resultant injuries.[66]

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Boston, etc. Ry., 14 Id. 466; Snow v. Housatonic Ry., 8 Allen, 441; Gillman v. Eastern R. Co., 10 Id. 233; 13 Id. 433.

[65] Clark v. Holmes, 7 H. & N. 937.

[66] Lalor v. Chicago, etc. Ry., 52 Ill. 401; s. c., 4 Am. Rep. 616.

HAS A CHECK-HOLDER A RIGHT OF ACTION AGAINST A BANK?

In these days, when so much of the business of the world is transacted through the medium of the banks, when nine out of ten business men settle their bills by check instead of by cash payments, it becomes pertinent to inquire as to the rights of the check-holder as against the bank on which the check is drawn. The giving of a check on a bank where the drawer has no funds is, of course, a fraud.[1] But what are the rights of a check-holder when the bank, having funds of the drawer, refuses to pay the check? Has he a right of action against the bank? The courts have divided on this question, and there has been much uncertainty and doubt, but of late this doubt has well nigh disappeared. One line of decisions has been made upon the theory that, by the acceptance of a deposit the bank assumed to pay out the fund on the checks of the depositor in such a way that there arose a privity of contract as to the payee, who thereupon became entitled to a right of action against the bank on its refusal to pay; that the drawing, or the presentation, of the check, worked an appropriation of the fund *pro tanto*, and the bank became debtor to the payee instead of to the drawer. The other line of decisions is upon the theory that there is no authority in the depositor (drawer) to change the character of the bank's indebtedness without its express assent. Each of these theories is so well supported by argument and decisions that one writer has said: "When one comes to examine the authorities which range themselves on either side, and to investigate the chain of reasoning by which these authorities respectively seek to support themselves, the tale of the two honorable knights who fought about the question whether the shield between them was golden or silvern, is forcibly brought to mind. Each line of argument, in its turn, seems the more correct and the more satisfactorily backed by respectable authorities."[2]

One of the leading cases in which it is held that there is such a right of action was in South Carolina,[3] and this case is supported by Mr. Parsons, who says:[4] "We have no doubt that the holder should have this right, so long as the bank has funds of the depositor in its possession." This, however, is not a very strong indorsement. This principle has been approved in Iowa,[5] in Illinois,[6] in Louisiana,[7] and leaned towards in Kentucky.[8] Mr. Daniels, in his excellent work on Negotiable Instruments, adopts this view, but we think the authorities do not support him. He concludes that the holder of a dishonored check may avail himself of either of two courses. First. He may sue the drawer and the bank in one action—the former as drawer and the latter as an implied acceptor. For as an acceptance of a bill may be implied, so may the acceptance of a check. * * * * Second. The check-holder may sue the drawer of the check, on its dishonor, or sue the bank for money had and received to his use.[9] There is not space here to review the argument adduced in support of these propositions.[10]

There is a line of decisions to the effect that if A, for good consideration, promises B that he will pay to C a certain sum of money, the latter can maintain an action against A, though a stranger to the consideration;[11] and it is attempted to apply that rule to the case of a check. But there is no analogy. In the former case there is an express designation of the third person, and an express contract for his benefit. In the lat-

[1] Daniels Negot. Instr. (2nd ed.), sec. 1596.

[2] Morse on Banks & Banking (2nd ed.), p. 459.

[3] Fogarties v. Bank, 12 Rich. Law, 518.

[4] Parson's Elements of Mercantile Law (ed. 1862), 91.

[5] Roberts v. Austin, 26 Iowa, 316.

[6] Union National Bank v. Oceanica, etc. Bank, 89 Ill. 212; Brown v. Seckie, 43 Ill. 500.

[7] Van Bibben v. Bank, 14 La. An. 481.

[8] Lesler v. Given, 8 Bush. 361; Weinslick v. Bellwood, 12 Bush. 140.

[9] 2 Daniels Negot. Inst. (2nd ed.), 594.

[10] Byles on Bills (Sharswoods ed.), *21, 96, note 1.

[11] Carrigue v. Morrison, 2 Metc. 381.

ter, the law implies the contract of the bank with the depositor, and no third person is named. If the bank agrees to pay checks drawn in favor of certain persons, then it would be liable, for this would amount to acceptance. When is the contract made by which the holder of the check obtains his right to maintain an action? When the check is drawn? Hardly; for in that case the bank might be ruined; for, as it pays checks in the order of their presentation, the fund might be exhausted while checks of an earlier date were yet outstanding. For instance, A, in St. Louis, makes on Monday a check on a home bank in favor of B, in Chicago, and sends it to him by mail; on Tuesday he makes a check in favor of C, in St. Louis; the latter is presented on Wednesday (the bank having no notice of the prior check), and paid; and on Thursday the check in B's favor is returned from Chicago for payment, and the bank has no funds to meet it, as C's check has exhausted the deposit. Evidently the contract is not made when the check is drawn. Is it made when the check is presented by the holder? This can scarcely be the case; for then the bank is simply called upon to fulfill an obligation which is assumed to have been previously incurred. Is it made when the bank refuses to pay? Then we have a new doctrine indeed—that one makes a contract by refusing to make it.

On the other hand, there is a strong and satisfactory line of decisions to the effect that the holder of an uncertified or an unaccepted check has no right of action against the bank. A check given is not presumed to be absolute payment of an account, even if the drawer have funds in the bank on which it is drawn;[12] and on the contrary, the implication is that it is only to be regarded as a payment if cashed.[13] It is not an assignment of the fund to the payee, unless accepted by the bank;[14] though there are authorities to the contrary.[15] But without discussing in detail the reasoning which leads to the conclusion, let us come at once to the decisions holding that there is no right of action against the bank.

A decision of the United States Supreme Court is of right entitled to the highest consideration, and on this question that court has spoken positively.[16] The court says: "The contract between the parties (*i. e.*, the bank and the depositor) is a purely legal one, and has nothing of the nature of a trust in it.[17] * * * * If it were true that there was a privity of contract between the bank and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. * * * The right of a depositor, as was said by an eminent judge,[18] is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the consent of the depositary. This is a well-established principle of law, and is sustained by the English and American decisions."[19] It was therefore held that there was no right of action. In a later case,[20] the court affirmed the ruling made in Bank v. Millard, so that this must be held as the rule in all the Federal courts. It was followed by Gresham, J., in Indiana, in a case, not reported, I think, arising *In re* Metzger, in bankruptcy. This view has been largely adopted by the State courts, and it certainly has a preponderance of authority, both in quantity and quality, in its support, as the subjoined citations will show.[21]

[12] 2 Parsons on Contracts, 623; 17 Ind. 609.
[13] 2 Daniels' Neg. Insts. (2d ed.), 578.
[14] Morse on Banks & Banking (2d ed.), 275.
[15] 2 Daniels' Neg. Insts. (2d ed.), 590 and 536.

[16] Bank v. Millard, 10 Wallace, 152.
[17] Citing Foley v. Hill, 2 Clark & Finnelly, 28.
[18] Gardiner, J., in Chapman v. White, 2 Seld. 417.
[19] Citing Butterworth v. Peck, 5 Bosworth, 341; Bollard v. Randall, 1 Gray, 605; Harker v. Anderson, 21 Wend. 373; Dykers v. Leather Mf'g Co., 11 Paige, 606; National Bank v. Elliott Bank, 5 Am. Law Reg. 711; Parsons on Bills and Notes (1863 ed.), 59, 60 and 61, and notes; Bellamy v. Majoribanks, 8 E. L. & Eq. 522, 523; Wharton v. Walker, 4 Barn. & Cress. 163; Warrick v. Rogers, 5 Manning & Granger, 374; Byles on Bills, chapter "Check on a Banker;" Grant on Banking (London ed., 1856), 96.
[20] Bank v. Whitman, 4 Otto, 343.
[21] Smith's Banking Laws, 375; Bank v. Cook, 73 Pa. St. 483; Carr v. Bank, 107 Mass. 45; Hagen v. Bank, 64 Barb. 197; Ætna Nat. Bank v. Fourth Nat. Bank, 64 N. Y. 82; Van Alen v. Bank, 52 N. Y. 4; Duncan v. Berlin, 60 N. Y. 151; Tyler v. Gould, 48 N. Y. 682; Moses v. Bank, 34 Md. 580; Simmons v. Cincinnati Savings Society, 31 Ohio St. —; Nat. Bank of Rockville v. Second Nat. Bank, Sup. Ct. Ind., May 26,

But if a check has been accepted or certified by the bank, its liability is fixed, and a certified check is as binding on the bank as a certificate of deposit, its note of circulation or any other obligation it can assume;[22] and the drawer is discharged if the holder accepts certification instead of payment.[23] Though if the check be certified under the erroneous impression that the drawer has funds, when he in fact has none, or if the certification is induced by fraud, it may be revoked if no equities have intervened.[24]

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1880; Bank v. Merritt, 7 Heisk. (Tenn.) 117; Bank v. Keese, Id. 220; Pursell v. Allemong, 22 Gratt. 724; 2 Parsons Notes & Bills, 61, 62, 273; Grant on Banks & Banking (1873 ed.), 106; Hopkinson v. Foster, 19 Eq. Cas. L. R. 74.

[22] Merchants' Bank v. State Bank, 10 Wall. 648; Morse on Banks & Banking (2d ed.), 307-8.

[23] 2 Daniels Neg. Insts. (2d ed.) 559.

[24] Id., p. 562.

INSURANCB—POLICY FOR BENEFIT OF INFANT DAUGHTER—FATHER'S INTEREST.

GLANZ v. GLOECKLER.

Supreme Court of Illinois, February, 1883.

Where a father procured a policy of insurance upon his own life, for the benefit of his infant daughter, which was in express terms made payable upon his decease to her, her executors, etc., and paid all the premiums thereon out of his own funds, making no charge of the same against her, and retaining the custody of the policy: *Held*, that the contract of the insurance company was with the daughter, and upon her death the legal title in the contract vested in her legal representatives, and that the father was not legally entitled to the possession of the policy, and that the administrator of the deceased daughter was entitled to an order for its surrender to him.

Appeal from Cook County Circuit Court.

MULKEY, J., delivered the opinion of the court:

This was a proceeding by petition, commenced originally in the probate court of Cook County, by Charles S. Gloeckler, the appellee, as administrator of Amelia L. Gloeckler, his deceased wife, against Louis Glanz, the appellant, and father of the said Amelia L. Gloeckler, to recover the possession of a policy of insurance issued by the United States Life Ins. Co., of New York City, upon the life of appellant, for the sum of $5,000, to be paid upon his death to the said Amelia L. On the hearing of the cause, the probate court entered an order directing the surrender of the policy, in conformity with the prayer of the petition. From this order Glanz appealed to the circuit court of Cook county, where the cause was heard *de novo*, and a similar conclusion reached. Appeliant thereupon prosecuted an appeal to the appellate court for the first district, where the judgment and order of the circuit court were affirmed, and he now brings the cause here for review, and the cause is submitted upon the following agreed statement of facts: December 10, 1860, the United States Life Ins. Co., of New York City, in the State of New York, made, issued and delivered, in said city, its policy of insurance, numbered 8,503, which declared, among other things, that, in consideration of $122.35, to said company, in hand, paid by Amelia L. Glanz, and of the annual premium of $122.35, to be paid in advance on or before December 10, in every year during the continuance of said policy, said company did insure the life of said Louis Glanz in the amount of $5,000, for the term of his natural life; and that said company did thereby promise and agree, to and with the said assured, her executors, administrators and assigns, well and truly to pay, or cause to be paid, the said sum assured to the said assured, her executors, administrators or assigns, within three months after due notice and proof of death of said Louis Glanz: *Provided*, that if said Louis Glany should, without the consent of said company, previously obtained and entered upon said policy, pass beyond the settled limits of the United States, then said policy shall be void, and that said policy should also be void in case any representation in the application for said policy should be found to be untrue.

Permissions to said Louis Glanz to visit or to reside in Europe are indorsed upon said policy, under date of March 1, 1861, March 7, 1862, March 20, 1866, and March 17, 1867. Said policy was issued on the application of respondent, Louis Glanz, in the year A. D. 1860, and when the said Amelia L. was only six years old. All premiums have been paid by the respondent, and out of his own money, up to the death of the decedent. The decedent and beneficiary in said policy was the daughter of this respondent, and the only daughter and child of respondent at the date of this issue of said policy; that decedent died August 22, 1879, at the age of twenty-five years, and left her surviving no child or children, or decendants of child or children; that decedent never paid anything to the respondent for or on account of said policy, but was his daughter and resided with him until her marriage in June, 1879, nor has he, the respondent, ever made any charge against her estate for or on account of said premiums; that respondent has had possession of said policy since its issue, and the permission thereon for respondent to visit Europe were granted by the company, by respondent's sole request; that said policy was made and issued in the City of New York, in the State of New York, and there delivered; that said policy has a surrender value of over $1,000; that the respondent, on the 9th day of October, 1879, served upon the

company issuing said policy a written notice, notifying said company of respondent's purpose and desire to change the beneficiaries in said policy."

It is clear, from an examination of the policy, the sum insured upon appellant's life is, in express terms, made payable upon his decease to his daughter, appellee's intestate, and had she survived him it will not be questioned that she alone could maintain an action on the policy; or, in other words, it must be conceded the contract, of which the policy is the only evidence, was between the company on one side and Amelia L. Glanz on the other, and the company expressly covenant with her, "her executors, administrators and assigns," and upon her decease it is clear the legal title in the contract vested in appellee as her legal representative. This being so, we are aware of no principle that would authorize appellant to arbitrarially, and without the consent of appellee, defeat this vested right in him. Nor is this right in this respect at all affected by the fact that the contract of insurance was entered into by the company on the application of the appellant upon his own life, or that the premiums were paid to the company out of his own funds. The contract having been expressly made with and for the benefit of appellee's intestate, as we have already seen, it follows appellee is legally entitled to the possession of the policy, and as the judgment of the circuit court was in conformity with this view of the law, it follows the appellate court committed no error in affirming it. Had appellant, when causing this policy to be executed to his daughter, desired to retain control over it, in the event of her death without issue, it would have been very easy to have provided for such a contingency; but nothing of this kind was done, or even attempted to be done, and he must abide the consequences.

The view we have taken of the case seems to be fully sustained by the authorities. Endie v. Slemmens, 26 N. Y. 9; Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157; Swan v. Snow, 11 Allen, 224; North American Life Ins. Co. v. Wilson, 111 Mass. 542; Cont. Life Ins, Co. v. Palmer, 42 Conn. 60; Hulson v. Merryfield, 51 Ind. 24.

A number of cases have been cited by appellant which are supposed to lay down a different rule in cases of this character. Without entering upon any analysis or review of those cases, suffice it to say that upon a careful consideration of them we are of opinion that they are all distinguishable from the case before us, and may readily be reconciled with the view we have taken of it.

Judgment affirmed.

SCOTT, C. J., and WALKER, J., dissent.

EQUITY—SPECIFIC PERFORMANCE—UNILATERAL CONTRACT.

TRUE v. HOUGHTON.

Supreme Court of Colorado, December Term, 1882.

1. Equity will decree the specific performance of a contract to deliver mineral stocks of uncertain value.

2. Where a contract is binding upon only one party until the performance of some condition by the other, it may be revoked at any time before the performance of such condition; but after the performance of such condition it becomes binding and enforceable.

Error to the Anapahoe District Court.

Wells, Smith & Macon, for plaintiffs in error; *Markham & Patterson*, for defendants in error.

BECK. C. J., delivered the opinion of the court:

This was a proceeding to enforce an agreement to transfer and deliver a number of shares of stock in the Sacramento Mining Company. The plaintiffs below, Houghton and Curley, obtained a decree for the delivery of the shares of stock sued for, and to reverse this decree the defendants have sued out this writ of error.

The first proposition laid down by counsel for plaintiffs in error is, that a court of equity will not specifically enforce a contract relating to personal property.

That courts of equity have jurisdiction to decree the specific performance of agreements, whether relating to real or personal property, is well settled. It is true that special circumstances must exist, entitling a party to an equitable remedy, in order to authorize the exercise of the jurisdiction; but the authorities agree that its exercise does not depend upon any distinction between real and personal estate. The ground of the jurisdiction, when assumed, is, that the party seeking equitable relief can not be fully compensated by an award of damages at law. When, therefore, an award of damages would not put the plaintiff in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the redress to which he is entitled, a specific performance may be decreed. The exercise of the jurisdiction depends upon the fundamental rule of equity jurisprudence, that there is not a plain, adequate and complete remedy at law. 1 Story's Eq. Jur., secs. 716, 717 724, n. 2; Fry on Spec. Per., 47, sec. 10, note 7; Pomeroy on Spec. Per., secs. 7 and 8, ch. 1.

One of the principal objections urged against the decree is, that the subject matter of the action being stock in a corporation, there was an adequate remedy at law. In the discussion of this objection counsel for plaintiffs in error insist that equity will not enforce a contract for the transfer of ordinary mining stocks. We find the authorities somewhat conflicting upon questions of this character. They are uniform on the proposition that a covenant for the delivery of government

stocks, and other public securities, will not be enforced in equity. Ross v. Union Pacific Railway Co., 1 Woolw. 26; Pomeroy Spec. Per., sec. 17. The reasons assigned for the rule respecting public stocks are, that these stocks are always for sale, their prices are known, and the damages awarded at law will enable the injured party to make himself whole by purchasing in the market.

The English authorities decline to extend the rule to contracts for the delivery of the stocks of railways and other companies, and the English courts decree specific performance of such contracts, upon the ground that such shares or stocks are of uncertain value, and not always readily obtainable in the market. 1 Story's Eq. Jur., sec. 724a.

The rulings of the courts of this country have not been uniform upon these questions, some of them following the English rule, others recognizing the fact that the reasons for that rule did not apply with equal force in this country, have adhered to the rules applicable to equitable remedies in other cases.

In Ross v. Union Pacific Railway Co., *supra*, Mr. Justice Miller assigns strong reasons why a contract to transfer certain shares of that railway company should not be specifically enforced. He says: "I see no sound reason for any distinction between them and government stocks. They belong to a class of securities which are generally called stocks; they are the subject of every day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver such shares, may be awarded at law, and be an adequate compensation for the injury sustained." These views appear to be sustained by the weight of authorities, and upon principle seem equally applicable to the shares or stocks of all corporations, concerning which the same facts therein recited exist. See Pomeroy Spec. Per., sec. 9, and cases cited. Does the case at bar come within this rule? Do the same facts exist in respect to the shares of stock of this mining company?

We learn from the record that the entire stock consists of 10,000 shares at $10 per share, and that up to the time of the purchase, by plaintiffs in error, of the 7,333 shares, no sales had been made. The five original trustees held and owned, up to that date, 2,000 shares each, which comprised the entire stock. What were the values of these shares? Plaintiffs allege in their bill that the shares bought were reasonably worth $20 per share. The price paid was $7.50 per share, and a portion of the defendants say that was an adequate and fair price, while the defendant who negotiated the purchase avers, in his separate answer, that whether the shares are worth $20 per share is unknown to both parties. It is fair to assume, then, that, up to the time these proceedings were instituted, the number of shares were limited; that these shares had no fixed or marketable value; that they were not selling upon the stock boards; and they were not quoted in the commercial reports. Certainly, then, their value could not have been "as readily and certainly astained as that of government stocks."

It is very apparent that there is a wide distinction between the shares of stock of such a mining company, and public stocks, government securities, or the stock of corporations which have been placed for sale upon stock boards, and are the subject of every day sale in the financial markets of the country.

This case comes within the principle decided in Treasurer v. Commercial Mining Co., 23 Cal. 391. Here, as in California, we have numerous mining corporations. It may likewise be said, as to many of them, that their business and mining operations are in a peculiar condition; their stock is of uncertain value, and difficult to substantiate by competent testimony, yet it may have a peculiar value to those acquainted with their affairs. The risk, also, of the personal responsibility of individuals and corporations is equally great.

In the present instance most of the defendants below are non-residents of the State, and their answers to the charge in the bill that they have no property or effects within the jurisdiction of the court, or in the State, out of which a money judgment could be made, are neither clear nor satisfactory. This charge is only denied in the answers as to the defendants Hubbell and Vestal. Hubbell says that he and Vestal "are possessed of and entitled to real property within the State of the value of $10,000, or thereabouts." Vestal does not answer at all, while Brown, assuming to know more about the financial affairs of these two men than they do themselves, answers that they are each possessed of property within the State of the value of $10,000. According to Hubbell's estimate (aside from the ambiguity of the language employed descriptive of their title), the value of the real property referred to as owned by himself and Vestal would fall far short of satisfying the plaintiff's claim, placing the shares of stock at the lowest estimate. We do not think that the remedy at law under such circumstances would be either certain, adequate or complete.

Another answer to the objection to the jurisdiction is, that the record does not show that the objection was made in the district court. It can not be said that the subject matter of the action is outside the pale of equity jurisdiction. By answering, therefore, to the complaint, instead of demurring thereto, and by voluntarily going into a hearing upon the merits, and failing to raise the the question of jurisdiction at any stage of the trial, the defendants have waived all objections to the nature of the relief sought and decreed. The court being competent to grant relief, and having jurisdiction of the subject matter, it was its duty to entertain the cause, and to render a

decree in accordance with its findings. Derry v. Ross, 5 Col. 295; Cutting v. Dana, 10 C. E. Green, 272-3; Clark v. Flint, 22 Pick. 231.

The point made by counsel that, under sec. 56 of our Code of Civil Procedure, which provides that the question of jurisdiction may be raised at any time, such objection in the present case may be raised for the first time upon appeal or writ of error, is not only unreasonable, but is defeated by the authority cited in its support. Note to sec. 434, Harston's Pr. The conclusion then, arrived at, is, that where the objection, if true, would only defeat the present right to recover, it must be made in the court of original jurisdiction.

It could not have been the intention of the framers of the Code, that where a cause is being tried in a court having jurisdiction of the subject-matter of the action, and competent to administer either equitable or legal relief, as the case may warrant, an objection of this nature may be silently reserved, and afterwards raised for the first time in the appellate court, whereas, if seasonably made at the hearing, might have saved the labor and expense incident to a new trial.

Another reason assigned why this contract should not be specifically enforced, is want of mutuality.

Counsel lay down and insist upon the broad proposition, that "courts of equity will never interfere to enforce a contract at the instance of one of the parties, which could not be enforced in equity at the instance of the other." While the general rule requires mutuality of obligation, as well as mutuality of remedy to authorize a specific performance, yet the doctrine is greatly narrowed by numerous exceptions and limitations found in the decided cases.

Mr. Pomeroy, whose work upon this subject is cited most frequently by counsel for plaintiffs in error, speaking of this rule, says: "I think it very clear that the rule was applied with much more strictness and severity in the older than in the later decisions; indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency; and the arguments in its support are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have little or no real force and meaning." Pomeroy Spec. Per., sec. 169, n. 1.

The class of contracts to which the contract in this case belongs, is cited in the authorities as an exception to the general rule. It is styled a conditional or unilateral contract. The promisor binds himself to execute the agreement on his part, upon happening of the condition, or upon performance, within a stated period of time, by the other party, of certain acts or considerations. Up to the time of such performance, these undertakings usually lack the elements of binding contracts. The promisee, in many instances, not being bound at all, the promisor is at liberty to revoke the promise on his part at any time before acceptance or performance. Upon performance of the condition, however, the contract is said to become absolute and mutual in its obligations. A decree can not, then, be prevented by setting up the original lack of mutuality. Fry on Spec. Perf., sec. 599, note 5; Pomeroy Spec. Perf., secs. 168, 169, and notes; Gordon v. Darnell, 5 Col. 302; Laning v. Cole, 3 Green's Ch. 229; Cutting v. Dana, 10 C. E. Green, 265.

In the comprehensive language of Mr. Justice Lawrence, in Perkins v. Hadsell, 50 Ill. 216, "the mutuality and the consideration consists in having actually done, upon the promise of the other party, what he required to have done, and it is immaterial that it was done without having entered into a previous undertaking to do it."

It is unnecessary for us to review the case upon the evidence. In our judgment, upon examination of the evidence, it supports the decree. The charges that false and fraudulent representations were made by Houghton to the defendants concerning his option upon the stock, are not supported. In fact, they are disproved alike by the testimony of both parties. Brown, who represented the defendants in the negotiations, was taken by Houghton to the owners of the shares and introduced to them, pending the negotiations. He testifies himself that he was, for several days, in their immediate vicinity, where he had opportunity, during the whole time of the negotiations, to inquire of them concerning this option. He failed to do so, but availed himself and his co-defendants of the services of the plaintiffs until after the completion of the purchase. Now they seek, by this puerile charge, to avoid payment of the stipulated consideration. The fact that the amount of the compensation agreed upon seems to be disproportioned to the services rendered, can not now avail. The contract was deliberately and voluntarily made by parties competent to contract, and its terms and conditions were fully understood by the defendants, as is shown by the testimony and exhibits.

The decree is affirmed.

CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY FOR PUBLIC PURPOSE —CHANGE OF GRADE—INJUNCTION.

MOORE v. CITY OF ATLANTA.

Supreme Court of Georgia.

1. The change of the grade in city streets, whereby the value of adjacent property is injuriously affected, is a taking of private property for public use, and can not be accomplished without the payment of compensation to the owner.

2. But the remedy of injunction stopping such public improvements will not lie. The property holder idjured is remitted to his action for damages.

JACKSON, C. J., delivered the opinion of the court:

This bill was brought by the complainant against the City of Atlanta to enjoin the municipal authorities from grading a street in front of the residence of the complainant, on the ground that the grade had been fixed by the city some years ago; that complainant had neglected to record it pursuant to law, but had acted upon it as fixed, had planted shade trees on the sidewalk which had become of great value, and would be destroyed if the new grade proposed was carried out; that it was projected now in the interest of certain persons owning property in the neighborhood; that there was really no necessity for it, and that its result would work irreparable injury and damage to the complainant. The injunction was refused by the chancellor, and complainant excepted.

We have held up this case for some time with a view to look clearly into the bearing which the Constitution of 1877 and the decision of this court thereunder in the case of City of Atlanta v. Green (made at the September Term, 1881, and not yet published), might have on the law of the case. Outside of that hearing, the case would have given us comparatively little trouble.

1. The act of the General Assembly, which gave complainant the right to have a permanent grade, made as a prerequisite to its value, as vesting a right in him, that it be filed for record. Acts of 1871-2, p. 301. Complainant admits that he did not record or file the grade which he avers to be given him as permanent in 1873, and therefore acquired no right under it; nor could he under that act recover damages from the city, much less enjoin it from grading the streets so far as that act confers rights upon him.

2. Nor does complainant give any reason for failure to record the permanent grade alleged to have been given him by Mr. Bass, the city engineer, in 1873, but "from ignorance or inadvertence," it was not filed record. Ignorance of the law and inadvertence—both or either—do not commend a complainant who seeks relief in a court of law or equity; never in a court of equity where the strong arm of injunction, which courts of equity alone can raise, is invoked by the suitor.

3. Therefore the rights of complainant must rest on the constitutional provision of the convention of 1877. That provision is, that "Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid." Art. 1, sec. 3, par. 1; Code, sec. 5024.

In the case of the City of Atlanta v. Green, *supra*, it was held that the constitutional provision was applicable to cases of injury or damage caused by grading the streets, without reference to the point whether the act of 1871, in regard to permanent grades, previously granted and recorded, was complied with, and the effect of not recording. It was ruled there distinctly, and it is now well-settled law in this State, that if any owner of property be damaged by the grading of a street, so as to lessen the pecuniary value of his property, he may recover damages for such injury to his freehold. That damage will be measured by the decrease in the actual value of his property. If it would have decreased in value as a mere residence without regard to the improvement of access made by the grade of the street, and yet this improvement and the increased value thereby produced, equalled the inconvenience or discomfort of the home as a mere residence, then the one could be set off against the other, and no recovery could be had. In other words, the right of recovery would turn in each case on the diminution in the pecuniary or market value of the property caused by the grade.

Weighed in these scales, how will the case at bar stand on the mere question of damage? Will the complainant's property decrease in value, and if so, how much? That much, little or large, he will be entitled to recover at law under the ruling in the case of Atlanta v. Green, before cited.

4. But the stoppage of all the improvements of the city by the stern writ of injunction, is another and vastly more important question. Has he or any other citizen the right absolutely to stop the entire system of grades of a whole street, or of two streets, because his property will be damaged if the contemplated improvement, in the judgment of the authorities, be carried into effect? Is it not better that one man's property be incidentally damaged, than that the city authorities be absolutely prohibited from grading the streets? Is it not more in harmony with all law and reason that this be so, especially when whatever damage the one man sustains, the municipality will be ready to pay? It might damage the one man $1,000 to make the contemplated grade; it might damage the march of improvements in a great and growing city millions of money not to make it. It is, therefore, more equitable, better, in every sense better, to pay the one citizen his comparatively small damage, than to impede the course of the city at the expense of millions, which the one citizen could not and ought not to be asked to pay.

We do not mean to say that in this case the march of improvement would be so stopped and at such injury to the city. But the principle would embrace all cases where the private property of any one citizen would be damaged by a contemplated grade of the streets by him. He could also enjoin the city, and the result would be disastrous. An injunction granted to one must, under like circumstances, be granted to all others, and the wheels of the municipal government, so far as improvement of streets is concerned, would be effectually blocked. Hence, the Supreme Court of Illinois, which was cited as authority in the City of Atlanta v. Green, while it rules that under a similar constitutional provision to ours, damages could be recovered, also rules that an injunction ought not to be granted to stop the operations of the municipal government and clog

its wheels. It must be observed, too, that this is not in that class of cases where private property is taken possession of and dominion over for public use; but the city is grading its own sidewalks. It is upon its own soil, and the damage is only consequential. The distinction is broad, and is made from the 75 Ill., *supra*.

It distinguishes this case also from Chambers v. Cincinnati, etc. R. Co. (decided at the September Term, 1882, not yet published), cited by plaintiff in error. There the actual seizure of the property of the plaintiff was about to be made by the railroad, and the court estopped the act of seizure until compensation was made. In that class of cases, too, a mode is provided for, as damages before the right-of-way can be had; in the class of cases before us there is none.

5. Questions of fact here, as in all applications for injunction, are for the chancellor below. We do not pass upon them unless his discretion be abused. In this case, Mr. English, the then Mayor of the city, and Mr. Rice, a contractor, are implicated by charges in the bill, as urging this grade for individual profit and emolument; but they deny, on affidavit, all intimations of the sort. The chancellor could hardly do othewise than accept this explict denial, as there is no positive evidence to the contrary. The intimations in the bill stand alone and unsupported in the record. If the authorities of the city were using their official power in behalf of individual profit of their own, or of others in collusion with them, at the expense and to the damage of other citizens, the courts would soon find means to put a stop to all such conduct: but as the charge would involve a deep degree of moral turpitude, the proof should be correspondingly strong and certain.

6. We see nothing in the point in regard to the action of council, their order to the commissioners of streets and subsequent reference to a committee and its non-action. It is evident that the city is moving in behalf of this grade with all its might. It defends the bill by its attorney; it surveys and fixes it by its engineer; and there is no doubt that all its authorities are moving to secure it.

On a careful consideration of the whole case, we see no course for this court under the principles of equity applicable to the facts but to affirm the denial of the writ of injunction.

Judgment affirmed.

NEGLIGENCE — IMPUTED TO INFANT.

GALVESTON, ETC. R. CO. v. MOORE.

Supreme Court of Texas, March 6,1883.

Where a child five or six years old has been sent by its mother upon an errand across a railroad track, and he is negligently injured by defendant's locomotive in crossing the track, the negligence of the mother in so exposing him to danger will not be imputed to the child so as to prevent his recovery in an action for the injury.

Appeal from Harris County.

Baker, Botts & Baker, for plaintiff; *Jones & Garnett*, for defendants.

STAYTON, J., delivered the opinion of the court:

The charge in all cases should be made with reference to the case made by the evidence, and in this case the court did not err in charging with regard to an injury inflicted upon the plaintiff while upon the track of the defendant's railway; for the facts in evidence left but little, if any, doubt that the injury was received by the plaintiff while upon the track of the railway. There was no assumption of that fact, however, in the charge, nor is there any complaint that the charges were not the correct or legal propositions.

It is claimed that the court erred in refusing to give the following charge: "The plaintiff has been held incompetent to testify because of his tender years. Now, if you believe from the testimony that the plaintiff, at the time he was injured, was so young and inexperienced as not to be capable of taking ordinary care of himself for safety when crossing railroad tracks where trains are frequently running, and if you further believe that the plaintiff lived with his mother, and was under her care and control, and that she had sent him on the day he was injured on an errand which required him to cross the railroad track in going and returning, and was in the habit of sending him across the railroad without protection, and that this was negligence on her part, and that such negligence of hers contributed to the injury of her son, or, in other words, that he would not have been injured but for such negligence of his mother, then you will find for defendant."

The court had instructed the jury that, "If the proof satisfy you that the defendant was negligent in running its engine and cars on and over its track, and that plaintiff's injuries resulted from such negligence, then find for plaintiff, unless the evidence shows that plaintiff contributed by his own negligence to such injury; and in considering the question of contributory negligence, being on a railroad track is *prima facie* evidence of negligence if the person was of age and discretion to realize the danger, but in case of a minor or child of tender years, only such care, discretion and judgment as a child has, *i. e.*, a child's discretion of such tender years, is required; but whether you find plaintiff guilty of contributive negligence or not, if defendant was not guilty of negligence, your verdict should be for the defendant."

The third charge, asked by plaintiff, and given in the court below, was as follows: "If the jury believe from the evidence that the plaintiff was injured as he alleges, and that just before and at the time of the injury, he was on defendant's railroad track, at or about a public crossing, and that he did not see or know of the approach of the train of cars that injured him; and if you further

believe from the evidence that the servants and agents of defendant were in charge of and running said train of cars on said track, and by the use of ordinary and reasonable care and prudence, could have seen the plaintiff and prevented said injury, then, if they failed to exercise such care and prudence, and by reason thereof, plaintiff, without negligence on his part, was injured, he is entitled to recover."

These charges submitted to the jury, fairly and clearly, the question of negligence in the plaintiff and defendant, and there was evidence tending strongly to show that the defendant was negligent in operating its train in a street, and at a crossing where people were constantly passing. And unless it be the law that the act of the mother in sending the boy, who was between five and six years old, in company with an older boy, upon an errand which required him to cross the railway, be negligence, which is to be imputed to the boy, there was no error in refusing to give the charge which was asked by the defendant.

As to whether the negligence of a parent is to be imputed to an infant, the opinions of courts, distinguished for their learning, are widely at variance, and they are, perhaps, irreconcilable. The leading case in America supporting the affirmative of the proposition is the case of Hartfield v. Roper, 21 Wend. 615, which, with many exceptions and modifications, has been followed in the main by the courts of several other States. This line of decisions seem to apply the rule without reference to whether the parent is present and in some way actually contributes by negligent act to the injury or not, and even to make the remote negligence of the parent or other legal custodian imputable to the child.

The case of Robinson v. Cone, 22 Vt. 213, is an exponent of the negative of the proposition, and courts of several of the States have gone in the same direction. Among those in which the question seems to have been carefully considered are the following: Bellefontaine, etc. R. Co. v. Snyder, 18 Ohio St. 400; Government Street R. Co. v. Hanlon, 53 Ala. 71; Boland v. Missouri R. Co., 36 Mo. 491; Ranch v. Lloyd, 31 Pa. St. 370; Daley v. Norwich, etc. R. Co., 26 Conn. 593.

The case of Waite v. Northeastern R. Co., El. Bl. & El. 719, is the leading English case upon the subject, and seems to limit the operation of the rule to cases where the parent or custodian is actually present and directing or controlling the action of the child; and to us this would seem to be the utmost limit to which the rule, in reason and upon sound principle, could be extended. This rule seems to have been recognized in the case of Stillson v. Hannibal, etc. R. Co., 67 Mo. 671. The basis of all obligation to compensate for an injury resulting to a child of tender age, not capable of contracting, arises from a breach of duty. In case of a parent, the duty of protecting the child from injury is a legal one, which ordinarily finds sufficient promptings in parental affection to induce its full performance. The parent is under a legal obligation to educate and maintain the child, and it has no legal claim upon others to perform that duty; but the obligation to do no act which will result in injury to a child, rests upon all persons and corporations as well as upon the parent; and in this respect it does not differ even in degree. With the parent the duties are largely affirmative; with others they are mostly negative.

In the case of persons and corporations exercising a dangerous public employment, as was the defendant in this case, in the center of a city, this negative duty is peculiarly strong, and it is difficult to perceive the legal principle which will excuse them from its performance upon the ground that some other person, even though that person be a parent, charged with a like duty, may have neglected to perform it. This is the logic of the rule by which the defendant in this case seeks to be excused for its own failure of duty.

The rule in this matter is so well and strongly expressed by Brickell, C. J., in the case of Government Street Railroad v. Hanlon, 53 Ala. 82, that we here insert and adopt it. He says: "If a child should be abandoned by its parents, thrown out as a mere waif on society, it is not possible, it seems to us, that one who negligently inflicts on it an injury, can be heard to invoke the parents' crime to shield himself from liability for wrong. It seems repulsive to our sense of justice, that because the parent is negligent of the child, others may with impunity be equally negligent of its helplessness and indifferent to its necessities. The law may not compel active charity for the relief of the child, but it does shield him from positive wrong or neglect. Without inquiring therefore, whether negligence can be imputed to the parents of the plaintiff, because they permitted him to go into a crowded street of a populous city, unattended (except by one probably not capable of protecting him), we do hold that if it were negligence, it can not be charged to the plaintiff or affect his right of recovery in this case."

If the rule contended for by the defendant was recognized, it might with propriety be held that the negligence of the mother was not the proximate cause of the injury. Davies v. Mann, 10 M. & W. 545; Kerwhacker v. Cleveland, etc. R. Co., 3 Ohio St. 172.

The court did not err in refusing to give the instruction asked by the defendant, nor in refusing to grant a new trial. The evidence tends to show that the defendant was operating a railway in the streets of the city; that its cars were running at a speed greater than permitted by valid ordinances of the city, with box cars in advance; that there was no look-out on those cars, no bell ringing nor whistle sounding to notify persons of its approach; the plaintiff was in the street at a regular crossing when injured, and the jury having found in effect, by their verdict, that the plaintiff used such care as could be expected from one of his age, and that his injury resulted from

the negligence of the defendant, the judgment must be affirmed, and it is so ordered.

LEGAL EXTRACTS.

POSTHUMOUS FAME OF LAWYERS.

The following is from Ex-Governor Hubbard's eulogy on William Hungerford, printed in 39 Connecticut Reports:

"And now when I consider this long life closed —these many years ended of eminent labor in the highest ranks of the forum—and nothing left of it all but a tolling bell, a handful of earth and a passing tradition—a tradition already half past— I am reminded of the infelicity which attends the reputation of a great lawyer. To my thinking, the most vigorous brain work of the world is done in the ranks of our profession. And then our work concerns the highest of all temporal interests, property, reputation, the peace of families, liberty, life even, the foundations of society, the jurisprudence of the world, and as a recent event has shown, the arbitrations and peace of nations. The world accepts the work, but forgets the workers. The waste hours of Lord Bacon and Sergeant Talfourd were devoted to letters, and each is infinitely better remembered for his mere literary diversions than for his whole long and laborious professional life-work. The cheap caricatures of Dickens on the profession will outlive, I fear, in the popular memory, the judgments of Chief Justice Marshall, for the latter were not clownish burlesques, but only masterpieces of reason and jurisprudence. The victory gained by the counsel of the seven bishops was worth infinitely more to the people of England than all the triumphs of the Crimean war. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava, and became immortal. Who led the great charge of the seven great confessors of the English Church against the English Crown at Westminster Hall? You must go to your books to answer. They were not on horseback. They wore gowns instead of epauletts. The truth is, we are like the little insects that in the unseen depths of the ocean lay the coral foundations of uprising islands. In the end come the solid land, the olive and the vine, the habitations of man, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tomb. Yet the infelicity to which I have alluded is not without its compensations. For what, after all, is posthumous fame to him who brought nothing into this world and may carry nothing out? The dead leave behind their reputations alike with their estates. A man may be libelled to-day as a fool, fanatic and a knave, and to-morrow his libellers sneak into his funeral procession, and the chief magistrate of forty millions of free men begs the honor of two feet of space at his obsequies. It is the old story — the tax which posthumous fame so often pays for its title —a garret and a crust in life, a mausoleum and statute afterward. What avails it all? We may justly console ourselves with the reflection that we belong to a profession which, above all others, shapes and fashions the institution in which we live, and which, in the language of a great statesman, 'is as ancient as the magistracy, as noble as virtue, as necessary as justice' — a profession, I venture to add, which is generous and fraternal above all others, and in which living merit is appreciated in its day according to its deserts, and by none so quickly and so ungrudgingly as by those who are its professional contemporaries and its competitors in the same field. We have our rivalries — who else has more? but they seldom produce jealousies. We have our contentions—who else has so many? but they seldom produce enmities. The old Saxons used to cover their fires on every hearth at the sound of the evening curfew. In like manner, but to a better purpose, we also cover at each nightfall the embers of each day's struggle and strife. We never defer our amnesties till after death, and have less occasion, therefore, than some others, to deal in *post mortem* bronzes and marbles. So much we may say without arrogance of ourselves—so much of our noble profession. No better proof and illustration can be found than in the life just closed —a life clear and clean in its aims, full of busy and useful labors—void, I dare believe, of offense toward God and man, crowned in its course with that threefold scriptural blessing—length of days, and riches, and honor."

WEEKLY DIGEST OF RECENT CASES.

1. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT—STATE FUNDING ACT.

In 1871 the General Assembly of Virginia passed an act funding the indebtedness of that commonwealth, and issued bonds with coupons attached, to those holding evidences of the prior indebtedness of the commonwealth, and, as a consideration for the surrender of the evidences of such prior indebtedness and their conversion into bonds under the funding act, the coupons attached were made receivable in payment for State taxes. At the time of the passage of said funding act, the remedy by *mandamus* to compel the tax-collector to receive such coupons in payment for State taxes was in existence, and the circuit court and Supreme Court of Appeals were vested with jurisdiction to enforce such *mandamus*. In 1872 an act

of the General Assembly was passed abrogating the remedies by *mandamus* and all other coercive processes, but this statute has been declared unconstitutional and void by the Supreme Court of Appeals of that State. In 1882 an act of the General Assembly was passed, requiring holders of coupons attached to bonds issued under the act of 1871 to first pay the tax assessed against them in cash, and then to submit the coupons held by them to the tax-collector, who, upon mandate issued to him to compel his receipt of the same, was authorized to make return that he was willing to receive the same on said taxes upon proof being made that the said coupons so tendered in payment were genuine and valid obligations under the funding act of 1871, the questions to be submitted to a jury for trial. *Held*, that the act of 1871 was a contract entered into between the commonwealth and its creditors, the obligations of which could not be impaired by subsequent State legislation, and that the holders of the coupons were entitled to have them applied to the payment of the State taxes due by them, but that the remedy provided by the act of 1882 was sufficient for the protection and enforcement of the rights of the holders of coupons attached to bonds issued under the act of 1871, and that the act of 1882 was not in violation of art. 1, sec. 10, of the Federal Constitution, inhibiting legislation from violating the obligation of contracts. Laws applicable to the case, which are in force at the time and place of making a contract, enter into and form part of the contract itself, and this embraces alike those laws which affect its validity, construction, discharge and enforcement; but changes in form of action and modes of proceeding do not amount to an impairment of the obligation of a contract if an adequate and efficacious remedy is left. MATTHEWS, J., concurring: In cases of enforcement of rights growing out of contracts made between a State and individuals, the remedy given by the State is the only remedy which the courts of the United States are authorized to administer. BRADLEY and GRAY, JJ., concurred in the judgment upon both grounds—that stated in the opinion of the court and that stated in the opinion of Mr. Justice MATTHEWS. FIELD and HARLAN, JJ., dissent. *Antoni v. Greenhow*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 91.

2. CONSTITUTIONAL LAW — STATE TAX ON ALIEN PASSENGERS—STATE INSPECTION LAWS.

The statute of New York of May 31, 1881, imposing a tax on every passenger from a foreign country landing in the port of New York, who is not a citizen of the United States, and holding the vessel which brings him liable for the tax, is a regulation of commerce within the exclusive power of Congress. The tax is not relieved from this constitutional objection by saying in the title of the statute that it is in aid of a law called an inspection law, which authorizes passengers to be inspected with reference to their being criminals, paupers, lunatics, orphans, or infirm persons, liable to become a public charge. Such facts are not to be ascertained by any inspection law, as that word was understood at the time the Constitution was formed nor since, as guilt and poverty and orphanage and lunacy are not to be ascertained by inspection alone. Inspection laws, and the words "imports and exports," as used in art. 1, sec. 10, cl. 2, of the Constitution, have reference to property and not to persons, and can have no reference to free human beings. This is apparent from the language of section 9 of the same article, where, as regards persons of the African race, the word "migration" is used in reference to the carrying of free persons, and "importation" in regard to slaves. The tax in question is void because forbidden by the Constitution of the United States. *People, etc. v. Compagnie Generale Transatlantique*, U. S. S. C., Feb. 5, 1883, 2 S. C. Rep. 87.

3. CONVEYANCE — CONDITION SUBSEQUENT — FORFEITURE.

1. A condition subsequent in a deed will be construed most strongly against the grantor, and a forfeiture will not be enforced unless clearly established. 2. In a conveyance to a corporation there was a condition that the land should be used as a site for a seminary building and should revert to the grantors when it should cease to be used for seminary purposes. The land was so used for several years, but in 1874, owing to a lack of funds and patronage, the seminary ceased to be maintained. In 1876, at a meeting attended by only a minority of the voters of the corporation, a resolution was adopted reciting that the seminary had been abandoned as an institution of learning, and empowering the trustees to convey the land to a manufacturing corporation. The original grantors thereupon demanded the surrender of the land to them as reversionary owners. The demand was not complied with, and the land was conveyed in accordance with the resolution, but the grantees in such conveyance never took possession or assumed control of the land, and in 1879 reconveyed it to the seminary corporation. In 1880 the buildings were repaired, against the objection of the original grantors, who claimed that a forfeiture had occurred, and the school was re-opened. In an action to recover the land, brought by the original grantors after the re-opening of the school, it is *held*, that there was no breach of the condition which worked a forfeiture. *Mills v. Evansville Seminary*, S. C. Wis., March 13, 1883; 15 N. W. Rep. 133.

4. CRIMINAL LAW — MURDER — PREMEDITATION — MALICE.

It was not error to charge: "It is not necessary that the deliberate intention to take life should exist for any particular length of time before the killing; if it enters the mind of the slayer the moment before he fires the shot, that is sufficient; it is deliberate intention at the time he makes up his mind to shoot, and, if it exists only that length of time it is sufficient in law." Neither was it error to charge that "malice is not ill-will or hatred, as most people supposed it to be. It is an unlawful intention to kill without justification, or mitigation, and it is not necessary for that intention to exist any length of time before the killing." *Bailey v. State*, S. C. Ga., March 27, 1883.

5. DAMAGES — OVERFLOW OF LAND CAUSED BY NEGLIGENT CONSTRUCTION OF RAILWAY—MEASURE OF DAMAGES.

1. When loss of property has happened, the value of that property at the date of the loss, with interest from that time till judgment, is considered a fair compensation. When a partial loss has resulted, the same rule should prevail; but the more accurate manner of arriving at its value would be to deduct its worth immediately after the injury from what it was immediately before. 2. As to injury to land upon which no crop was growing, the rule of damages would be the cost and expense of restoring the land to its former

condition, and the loss occasioned by being deprived of the use of the same, with interest. But no account of loss of profits by consequent delay in getting the crop to market should enter into the calculation. *Sabine, etc. R. Co. v. Joachimi*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep. 882.

6. EVIDENCE—DECLARATIONS OF OFFICERS OF CORPORATIONS.

Declarations made by the general agents and representatives of a corporation, concerning an indebtedness, which it was clearly within their power to contract and pay, are only admissible as *prima facie* evidence against the company, to be received for what they are worth, when they refer only to debts previously contracted. *Webb v. Smith*, S. C. Colorado, Feb. 16, 1883; 1 Denv. Law Jour., 46.

7. EVIDENCE—LOST INSTRUMENT—SUFFICIENCY OF PROOF.

The loss of a draft is not sufficiently proved, to support a suit in equity thereon against the drawer or acceptor, by evidence that it was left with a referee appointed by order of court to examine and report claims against an estate in the hands of a receiver, and that unsuccessful inquiries for it have been made of the referee, the receiver and the attorney for the present defendant in those proceedings, without evidence of any search in the files of the court to which the report of the referee was returned, or any application to that court to obtain the draft. *Rogers v. Durant*, U. S. S. C., October Term, 1882; 11 Wash. L. Rep., 180.

8. GUARDIAN AND WARD—MARRIAGE OF FEMALE WARD—JURISDICTION.

Upon the marriage of the female ward, the guardianship over her person and estate ceases as fully as though the guardian upon final settlement had been discharged, removed for cause or had died, and after the termination of an administration, however it may occur, the probate court has no power to render a decree against one who formerly held the fiduciary relation of administrator or executor; and the relation of a guardian in no way differs from an administrator or executor in reference to the jurisdictional question involved. *Timmons v. Bonner*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep., 896.

9. INSANITY—SUPPORT OF LUNATIC AND HIS FAMILY.

It is the duty of the court to appropriate so much of the income of the estate of a lunatic as shall be sufficient, not only for his own support, but also for the support of his family. Persons whom the lunatic, when sane, requested to live with him permanently as part of his household, and who remain in such relation after his lunacy, constitute members of his family entitled to support out of his estate. It is the duty of the court, when the estate is sufficient, to maintain and carry forward the affairs of the lunatic as they were when his mind failed him; to do that which it might reasonably suppose he would have continued to do had he retained his sanity. *Hambleton's Appeal*, S. C. Pa., Jan. 3, 1883; 12 W. N. C., 542.

10. JURY TRIAL—PRACTICE—REMARKS OF COURT TO SPECTATORS.

The fact that the judge below, after charging the jury that threats, menaces and contemptuous gestures would not justify the shooting of another, stated to the spectators that nothing a man could be called would authorize him to take life, can not be construed into an expression of his opinion on the facts of the case. The learned and able judge states in explanation of the above, that the court-room was filled with many ignorant people, among whom the idea had been prevalent that a man had a right to kill for words, and that counsel for prisoner had so stated in his argument to the jury, and that this admonition was deemed proper to correct this fatal and pernicious error. *Bailey v. State*, S. C. Ga., March 27, 1883.

11. LANDLORD AND TENANT—JUDGMENT AGAINST TENANT—WHEN EVIDENCE AGAINST A LANDLORD.

A judgment against a tenant rendered in a suit to which the landlord was not a party and which he had no opportunity to defend, is not admissible as evidence of the title of a person obtaining such judgment in a suit between such person and the landlord of the tenant. Read v. Allen, 56 Tex. 180. But such judgment and the pleadings upon which it was rendered are admissible to show when the possession of a landlord held through a tenant ceased to be a peaceable possession, but as against the landlord for no other purpose. *Read v. Allen*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep., 877.

12. LANDLORD AND TENANT—WAIVER OF THIRTY DAYS' NOTICE.

The tenant may contract with his landlord to quit on shorter notice than thirty days, notwithstanding the provisions of the Landlord and Tenant's Act of the Revised Statutes of the District of Columbia. *Waggaman v. Bartlett*, S. C. Dist. Columbia, Feb. 10, 1883; 11 Wash. L. Rep., 146.

13. LIMITATION—LONG POSSESSION BY CO-TENANT—REPUDIATION OF COMMON TITLE.

1. Where co-tenancy exists between parties, evidence which shows long possession by one co-tenant, of the common estate held in his separate right, does not imply that he held possession in his separate right in exclusion of his co-tenant. 2. Repudiation of the common title must always clearly appear in order to give the co-tenant the benefit of the statute of limitation, and acts and declarations of the party in possession are construed much more strongly against him than when there is no privity of title. *Teal v. Terrell*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep., 888.

14. SERVICE OF PROCESS—ADMISSION IN SUFFERING DEFAULT.

The petition showed cause of action against Rowell Brothers, alleging their Christian names to be unknown; the citations were not more definite, and were served upon Henry and R. P. Rowell. *Held*, that as they suffered judgment by default, they thereby admitted the cause of action against them, and the presumption is they composed the firm. *Sun Mut. Ins. Co. v. Seeligson*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep., 869.

15. STATUTE OF FRAUDS—UNDERTAKING TO ANSWER FOR DEBT DEFAULT, ETC., OF ANOTHER.

1. If W, being in need of money, solicits a loan from T, who informs him that he has not the money himself, but will repay it to any person from whom W may get it, and W applies for the money to the firm of W & B, stating to them the agreement of T, and they advance it, charging it on their books to T, and they afterwards apply in writing to T for payment, who replies in writing that he told W before he left that he could not get the amount before the 4th of December and perhaps not until some days later; to which W & B

replied: "All right, let us have it as soon as you can," which T said he would do; and if the jury believe from the evidence that the loan was made to T, and W was not held liable for it by W & B, and there was enough in T's conduct to authorize this conclusion on the part of W & B, then the undertaking of T was an original one, and not an agreement to answer for the debt, default, or miscarriage of another. If W & B were authorized to look to T alone for payment of the money, and did not look to Wight also, Tift was bound. 2. A promise in writing to answer for the debt, etc., of another, need not under our law, as in England, state the consideration for the promise. 3. The fact of the undertaking being in writing does not preclude inquiry as to whether a consideration for the promise in fact exists, as in the case of a promise to pay the pre-existing debt of another without any detriment or inconvenience to the creditor, or benefit secured to the debtor in consequence of the undertaking. Such a promise, according to all the authorities, is a mere *nudum pactum*. *Davis v. Tift*, S. C. Ga., March 20, 1883.

16. SURETY—JUDGMENT AGAINST PRINCIPAL, CONCLUSIVE AGAINST SURETY.

In an action against a surety, a judgment recovered against the principal debtor is, in the absence of fraud or collusion, conclusive as to the amount of the indebtedness as against the surety. *Lindsey v. Reid*, S. C. Pa., Nov. 20, 1882; 12 W. N. C. 545.

17. WILL—TESTAMENTARY CAPACITY— UNDUE INFLUENCE.

1. Testamentary capacity exists when the testator has mind and money enough to understand that he is selecting the persons whom he wishes to have his property, and to know his property, and the natural objects of his bounty and his duty to them, and the persons upon whom his property is bestowed by his will. 2. Influence obtained by modest persuasion and arguments addressed to the understanding, or by mere appeals to the affections, can not be properly termed undue influence in a legal sense, but influence obtained by flattery, importunity, threats, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another. *Wise v. Foote*, Ky. Ct. App., Feb. 5, 1883; 1 Ky. L Rep. & Jour. 643.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

24. B and Mc gave their note to H, as follows: "For value received, I promise to pay H one hundred dollars in a few days." When is the note actionable under the Wisconsin statutes?

New Richmond, Wis. S. N. H.

25. What fee can a sheriff in this State (Mo.) exact from purchaser for each deed he executes and delivers? X. Y.

Poplar Bluff, Mo.

26. A and wife owned in Texas in December, 1882, a homestead then occupied by themselves and family. B, then one of the creditors of A, levied an execution on the above homestead while occupied. Three day's after the levy of execution, A and wife sell the homestead to C, and join in a deed by them duly signed and acknowledged to C for the premises, to whom they then delivered possession. B, pursuant to his execution levy, after due advertisement, has the officer holding execution to sell the premises at public vendue, and the same was bought by B's attorney and the wife of B, to whom a deed was made, and the bid credited on the execution; no money was paid by purchaser. Was the levy void when made? If not would it be sufficient to support the sale and sheriff's deed? J. W. J.

Denton, Texas.

27. Under the Constitution and laws of Arkansas, is the equity of redemption the subject of schedule and exemption. In other words, is there any way to prevent its sale when levied on by an execution or judgment creditor? * * *

28. September 19, 1882, A employed B to work as "trimmer" in her millinery store for the season ending December 25, 1882, at $10 per week wages. B continued in A's employ from said September 19 to October 9, 1882, when A discharged B without cause. B then sought work elsewhere in the same line of business, but could only obtain work outside of her trade, and that at $3 per week wages. A then went to B and offered her $6 per week without express reference to time, to engage in the same business contemplated under the first contract. B accepted the last offer, and continued in A's employ from October 10 to December 12, 1882, when she was again discharged by A without cause. Has B a cause of action against A for loss of difference in wages ($4 per week), and for full wages at $10 per week, from December 12 to December 25, 1882? J. T. A.

Atchison, Kan.

29. A made the following will: "I hereby will, bequeath or give E S, wife of J S, all my right, title and interest (after my death and after my debts shall have been paid) in all my real estate and appurtenances belonging thereto, located, etc.; also all my personal property and effects, to have and to hold the same as her exclusive right and title, for her benefit and for the benefit of her children." E S was a neice of the testator, and had children living at the time of his death, who, with herself and children born since the death of the testator, are now living. The property devised consisted almost exclusively of valuable real estate. What interest does E S take under the will? What interest do the children take, if any? What distinction between those born before and those after the execution of the will? X.

Martins Ferry, O.

30. A party (O H) by will conveyed to his wife, among other bequests of a personal character, the use of the homestead, a village residence, which she and he occupied. Afterwards, both parties united in conveying, by exchange, the real estate for another residence. The devisor died without making another will. How far will the will stand, and what are the rights of the wife in the real property now in the possession of the estate? A. H. S.
Delphi, N. Y.

31. A deed is secured by fraud. The land is conveyed as a gift. Before record of donee's deed, the donor makes a mortgage on the same land. The donee's deed is recorded prior to the recording of the mortgage; all without actual notice. The original defrauded grantee recovers the land in a suit to which the mortgagee was not a party. The recording act provides that "after recording, all purchasers and mortgagees shall be deemed purchasers with notice." Also, that "until deposited for record, such instrument shall be of no validity except as between the parties thereto and such as have actual notice." What are the rights of the mortgagee and original grantor respectively? ?
Humboldt, Kan.

32. A city, under its charter, which provides that the city council shall have power to "erect useful or necessary buildings for the use of the city," issued bonds to erect a "High School." Was a High School such a building? The city was not a school district.
Omaha, Neb.

33. Plaintiff and defendant come to issue upon certain facts, which the plaintiff proves, and these facts are not sufficient to entitle the plaintiff to relief. Will the judge, upon his own motion, dismiss the cause?
Des Moines, Ia. F. V.

34. Can estates by entireties be created in those States which have made provision for a homestead, and in which the common law estates have not been abolished by statute? *
Topeka, Kan.

35. Are the persons named in the acts of the Legislatures of the different States, authorizing those persons to lay out State road, officers under Art. IV., sec. 28, Const. Wis., and similar provisions in the Constitution of the State of New York and other States? And, if so, must they take the constitutional or other form of oath of office before they proceed to lay out the roads and condemn land?
Pepin, Wis.

Query 20. [16 Cent. L. J. 159.] A makes a promissory note payable to B, to secure a debt, and sent the note to B by mail. B sent the note back, saying that he would not accept it unless the rate of interest was increased and the time shortened. A then destroyed the note. B allowed his original claim to outlaw, and having taken a copy of the note, sues upon it, alleging original to have been destroyed. Can he recover? J. P. W.
Youngstown, O.

Answer. I do not think there can be a recovery. A note is but a contract reduced to writing, for the payment of money; and if tendered, but not accepted, no contract arises. "There is no contract unless the parties thereto assent, and they must assent to the same thing in the same sense." 1 Parsons on Contracts, star page 475. In note *c* it is said: "To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it, does not render the other liable on it. Johnston v. Fisher, 7 Watts. 48; Ball v. Newton, 7 Cush. 599. "The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter." 1 Parsons on Contracts, star page 476. Applying this principle to the case suggested, there never was a contract arising on the note. A proposed a contract, and until its acceptance in the very terms proposed, he had a right to withdraw. B never accepted the note as tendered, consequently he never owned it, and is not now in a position to have the benefit of the rule governing suits on lost or destroyed notes. E. B. N.
Minneapolis, Minn.

RECENT LEGAL LITERATURE.

AMERICAN LAW STUDIES, or Self-Preparation for Practice in the United States. A Course of Instruction, Reading and Exercises for Students and Young Lawyers, by which they can Thoroughly and Rapidly Train Themselves for Legal Business. By John C. Reed. Boston, 1882: Little, Brown & Co.

This work is a manual of legal literature and method of study for the law student. The topics discussed are: 1. The established agencies of legal education—works on law studies, office pupilage, the law school, private study and attendance upon the courts. 2. The methods of study and the kinds of exercises which best teach the acquisition of legal principles, and, at the same time, their ready and accurate use in forms and cases. 3. The subjects which are of general occurrence in practice. 4. The Anglo-American law sources, especially the reports and their proper study, digests, text-books, table of cases and statutes, as helps to the sources; and the processes of legal investigation. 5. The general law, the Federal law and the State law in their differing relations to each other in every American jurisdiction. 6. Legal biography, the law periodicals and catalogues.

The work is handsomely printed and well-bound.

SOME EXPERIENCES IN A BARRISTER'S LIFE. By Mr. Sergeant Ballantine. A new edition from the sixth London edition, with additions, corrections and a new preface written by the author in America. Philadelphia: 1883: J. B. Lippincott & Co.

The recent visit of Mr. Sergeant Ballantine to this country has done much to create an interest in his life and work. This volume will be interesting reading for those who delight in memoirs and personal reminiscences. It is a charming, rambling, disconnected narrative, of the events and incidents in the life of the distinguished au-

thor. The Experiences have been received with great favor in England, and we predict a corresponding reception in this country. To the lawyer who wishes to know something of the personal characters of the great English lawyers and judges we can recommend this volume.

The binding is unique and beautiful, and too much can not be said of the work of the publishers.

HUMOROUS PHASES OF THE LAW. By Irving Brown. New Edition, Revised and Enlarged. San Francisco, Cal., 1882: Sumner, Whitney & Co.

Until one has whiled away a leisure hour by dipping into the pages of this pleasant little volume, he will hardly realize what a mine of ludicrous incongruities the reports may become when skilfully worked. The author says in his preface that he has not intentionally exaggerated or misrepresented any of the cases cited. "If anything humorous shall be discovered in them, therefore, the reader may rely that the author has not made fun of the law, but has only allowed the law to make fun of itself." And also: "To those who view her aright, the law will now and then relax her grave face, and although waiting on her is, on the whole, a serious profession, I see no reason why it should be pursued as a penance." We heartily recommend the volume as an inducement to good digestion when looked into over an after-dinner cigar.

LAW AND LAWYERS IN LITERATURE. By Irving Brown, Author of "Humorous Phases of the Law," "Short Studies of Great Lawyers." Boston, 1883: Soule & Bugbee.

"O wad some power the giftie gi'e us,
To see oursel's as ithers see us."

The lawyer who reads Irving Brown's volume now before us, will have realized the longing of the poet, but whether he will feel the better for his knowledge is an open question. For our own part, we have found a grim pleasure in listening to the railings and revilings of angry authors. Conscious innocence can afford a complaisant smile under such attacks. Its virtue is its shield. Thus the fierce assaults and malicious sneers of the enemy are served up as titbits for the amusement of the victim.

The author has gleaned the field of literature, and collected the allusions, complimentary and otherwise—principally otherwise,—to the law and the lawyers. The result is a very interesting volume with which to beguile an idle hour, a charming vacation companion.

NOTES.

——Yesterday a *Courier-Journal* representative ran across Captain J. A. Jessell, the Louisville kinsman of the great English judge, Sir George Jessell, Master of Rolls, and asked some particulars about this distinguished personage. "George Jessell's father," said the Captain, "was a wealthy diamond merchant, the only dealer in London who cut diamonds. He had a large vault, the size of an ordinary room. This was pigeonholed off, and there in envelopes he kept his store of diamonds. His cutting-shop he carried on at Amsterdam. My father's family lived about two miles distant from George's, but as grandmother lived with us his folks came out almost every Sunday visiting, always bringing wine, snuff, etc. George had one sister and three brothers. He is the youngest; the oldest brother died a judge before him; the other brother is now a barrister. I am eight years older than George"—the captain confessed to being sixty-five; he doesn't look to be fifty, being a rosy-faced, bright-eyed, brisk-stepping gentleman—"and many are the fights we have had. I have often whipped him and his two brothers, as they would all three pitch onto me. I was engaged to my cousin Leah, but the engagement was broken by my coming to America, when I married Miss Heyman, whose grandfather fought under Washington and died a pensioner, aged ninety-seven. In 1851 George came to Louisville on a hurried trip with some notables, registered at the Galt House, and came out to the Jewish Temple, which was then on Fourth street, near where the *Courier-Journal* edifice now is. He missed seeing me at the Temple. I heard of it and went to the Galt House, but the party had been compelled to hasten away. I have never been back to England, and only know from the press and men who have met him what a great lawyer and judge he was. He is said to have expedited business better than any judge in the realm, and his decisions were never questioned. He left a fortune of over $10,000,000."—*Louisville Courier-Journal.*

——The following unique and anomalous affidavit was filed in a State case, by a prosecuting attorney of one of the counties south of the Osage River, in this State, at a recent term of circuit court:

State of Missouri, }
County of Kinderhook, } *ss.*

STATE OF MISSOURI, Plaintiff,
v
H. WINES, Defendant.

W. U. Tood, on his official oath, as prosecuting attorney of said county, states that he verily believes that the defendant in the above cause, has an undue influence over the minds of the inhabitants of Monito and Coper Counties, and therefore asks that this case, when change of venue is granted, as asked by defendant, be sent to some other county in this circuit where such influence does not exist.

W. U. TODD,
Prosecuting Att'y. Kinderhook County.